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Supreme Court, U.S.
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No.— 08-621

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IN THE
SUPREME COURT OF THE UNITED STATES

Eric Gant,
Petitioner,

v.

Grand Prairie Ford, L.P.,
Respondent.

On Petition for a Writ of Certiorari to the United States Supreme Court for the Texas Supreme Court

PETITON FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the State court's ruling on Grand Prairie Ford's statutory right to a security and stay of proceedings outweigh the petitioner's constitutional right to due process of law (i.e. a right to a no evidence complaint or a right to a verdict supported by evidence) violate the U.S. constitutional protection afforded by 1st and 14th amendment?

PARTIES TO PROCEEDINGS

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RULE 29.6 STATEMENT

Petitioner, Eric Gant, is a private citizen not a corporation with a percentage of ownership in subsidiaries. This petition is within the 9000 word limitation.

Respondent

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PETITON FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the State court stating Texas Civil Practice & Remedies Code Ann. §§ 11.052 (Vernon 2002) precludes the filing of a no evidence complaint is unreported.

JURIDICTION

The jurisdiction of the United States Supreme Court is invoked in a timely manner under Article III § 2(2) of the United States constitution, and title 28 United States Code § 1257. The verdict sought to be reviewed was entered July 19, 2007 by the Second District of Texas Court of Appeals Forth Worth. On April 4, 2008, the Texas Supreme Court denied a timely filed petition for rehearing. In accordance with United States Supreme Court rule 29(c) and 28 U.S.C. § 2403(b), the Texas State Attorney General has been served. The court did not certify a question of the constitutionality of the Texas vexatious litigant statute to the Texas State Attorney General Office. Pursuant to clerk's letter dated July 9, 2008 and September 11, 2008, this petition is to be corrected and filed within 60 days.

STATUTORY PROVISIONS INVOLVED

The relevant provisions are set forth at App., *infra*, 14a – 19a.

STATEMENT

Eric Gant ("Petitioner") respectfully petition for a writ of certiorari to review the opinion of a State court, (App., *infra*, 1a-10a) Court of Appeals Second District of Texas Fort Worth, for validity of a State statute, Texas Civil Practice & Remedies Code Ann. §§ 11.052 *et. seq*. Op., App., infra, 1a-10a, 16a. The Texas vexatious litigant statute infringe upon a fundamental right. U.S. Const. art. VI, § 2., U.S. Const. amend. I & XIV, § 1. Grand Prairie Ford filed a vexatious litigate motion against the petitioner's claim of deceit and fraud. During several auto service visits Grand Prairie Ford lied about petitioner's engine having oil where in fact there was no oil in the engine; and subsequently, there was serious injury.[1]. The State court rendered an opinion stating .. "Appellant [petitioner] argues that he was deprived of his right to due process of law because the trial court dismissed his claims even though Appellee [Grand Prairie Ford] did not assert affirmative defenses to his claims or file a response to his no evidence summary judgment motion." Op., App., infra, 5a. The State court's justification for not granting the petitioner's judgment is "litigation was stayed when Appellee [Grand Prairie Ford] filed its motion to declare Appellant [petitioner] a vexatious litigant, and because Appellant never deposited the security ordered by the trial court, § 11.052 [stay of proceeding statute] relieved Appellee of the burden of responding to Appellant's [no evidence] motion." Id., App., infra, 7a. The petitioner's *justifiable reliance* on a misrepresentation of fact is neither less probable nor more probable when Grand Prairie Ford *alleged*

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[1] *Id.*

"Appellant [petitioner] had refused the services recommended by Appellee [Grand Prairie Ford]...." Id., App., infra, 8a., Fed. R. Evid. § 401 & § 402., Tex. R. Evid. § 401 & § 402. *See* also Mot., App., Infra, 32a. Grand Prairie Ford's alleged evidence, if true, has no logical and relevant connection to "a misrepresentation of fact" and a "justifiable reliance upon the misrepresentation" which caused the petitioner's injury. Id. Grand Prairie Ford's evidence is liken to a "sun on the horizon" whereby one can not infer that the sun is either on a "sunrise" or "sunset." Neither possibility is more likely than the other. Id. Thus, Grand Prairie Ford's evidence is irrelevant because the truth of the matter asserted, *justifiable reliance*, is not contested. Id. Grand Prairie Ford's evidence suggesting the petitioner's negligence contributed to his injury is contrary to 4 authoritative sources on legal defenses for deceit and fraud. Sources are cited in this petition and they confirm contributory negligence is not a legal defense for deceit and fraud. Id., *See* Pet. at 17. The petitioner believes a right to a no evidence complaint demanding a verdict supported by evidence is similar in operation of law to a right to assistance of counsel and a right to be heard whereas the fundamental right is protected even more so when it is asserted as a fundamental due process right. U.S. Const. amend. XIV, § 1. Because the Texas vexatious litigant statute shifts the entire burden to Grand Prairie Ford, and Grand Prairie Ford has no evidence at which weight can be given, the petitioner's complaint for damages resulting from a *justifiable reliance* on a misrepresentation of fact is not *groundless*. Id., Tex. Civ. Prac. & Rem. Code Ann. §§ 11.051. For these reasons, the petitioner believes he is justified in filing a complaint with the court. Id.

I.

State Court Proceedings.

On September 11, 2006, the petitioner filed a no evidence complaint (which *implicitly* asserts a Federal and State guaranteed right to a verdict supported by evidence presented) against a vexatious litigant and $2,500.00 security verdict, and it was denied. Id., CR 132. On September 26, 2006, in spite of a no response to a no evidence complaint, State trial court issued a final judgment in favor of Grand Prairie Ford. Id., CR 160. On appeal, the petitioner raised a no evidence point of error requesting a legal sufficiency review. Id. And, the Second District of Texas Court of Appeals rendered an opinion which interprets the Texas vexatious litigant statute to mean Grand Prairie Ford's right to a security and stay outweigh the petitioner's right to a no evidence complaint. App., infra, 1a-10a. Furthermore, in a motion for a rehearing, which was denied, the petitioner raised issue of legal insufficiency on page 1 wherein the petitioner stated "Evidence cited in court of appeals opinion is not relevant." As a result of the petitioner's motion for rehearing being denied, the Court of Appeals' opinion was sustained. Op., App., infra, 1a-10a. The Court of Appeals' opinion placed the validity of a Texas vexatious litigant statute into question because of the Supremacy Clause of Art. VI section II of the United States constitution which says Federal rights preempt or take precedence over State rights, and Equal Protection Clause of the 14th amendment which says an arbitrary verdict is unconstitutional. On appeal with Texas Supreme Court, the petitioner presented a question on page vi of his Petition stating "Whether a vexatious litigant statue precludes the filing of a no evidence complaint, and does the statute call for conclusive proof to prove

defendant's defensive theory or a case is frivolous." The Texas Supreme Court denied the petitioner's petition for review on February 8, 2008; and, subsequently, on April 4, 2008, (App., *infra*, 13a.) the Texas Supreme Court denied a timely filed motion for rehearing which showed on page 6 a Texas state law scheme which express litigation is never stayed to the exclusion of a no evidence complaint. Furthermore, the petitioner asserts "a litigant can file under substantive due process clause of the 14th amendment of the U.S. constitution a no evidence complaint with the U.S. Supreme court." In addition, the petitioner asserts a violation of the 1st amendment by stating, "the state court policy restricts the petitioner's fundamental right – right to petition the government to resolve grievances." Tex. Supr. Crt. Mot. ReHr'g. In spite of the petitioner's plea of a 1st and 14th amendment right to a no evidence complaint demanding a show of evidence to support the verdict, the Texas Supreme Court decided to deny the petitioner's motion for rehearing, which implicated an issue of constitutionality of a Texas vexatious litigant statute for the United States Supreme Court. U.S. Const. art. VI, § 2., U.S. Const. amend. I & XIV, § 1. The United States Supreme Court must determine whether the State court's ruling on Grand Prairie Ford's statutory right to a security and stay outweigh the petitioner's constitutional right to a no evidence complaint violate the U.S. constitutional protection afforded by 1st and 14th amendment? Id.

The petitioner's no evidence complaint demanding an evidentiary response which is a fundamental due process right outweighs a statutory right to a security and stay. Id. Invalidating the Texas vexatious litigant statute is important because the statute, in operation, not only violates a fundamental due process right but

the statute also divides litigants into two unreasonable classes – those who are attorneys and those who are not, one class being permitted, while the other is forbidden to lose no more than five cases within a seven year period or suffer a penalty in the form of a security and stay. U.S. Const. amend. XIV, § 1. The Texas vexatious litigant statute is viewed as a judicial tool whereby normative usage is an arbitrary and capricious security and stay application to a class of litigants who meet the statute characteristics. Id. As a result, the Texas vexatious litigant statue has an adverse impact on a poor class of non attorney litigants which put the court at risk of creating and sustaining a permanent under class of victims. Id. The Texas vexatious litigant statue does not increase equal access to justice it prohibits access to justice. Id.

The petitioner petition's the United States Supreme Court because the State court's Texas vexatious litigant statutory interpretation is beyond the textual meaning and only the United States Supreme Court can say whether the State court's interpretation of the will of State legislatures is beyond constitutional limits. Id. The judicial power of the United States "to say what the law is" is vested in only the United States Supreme Court. Marbury v. Madison 1 Cranch 137, 2 L. Ed. 60 (1803) is the authority at which binds the United States Supreme Court to a judicial review, and grants the United States Supreme Court power to strike down laws enacted by Congress or the states and to declare official government action unconstitutional. Id.

Factual Background

On May 8, 2006, the petitioner filed an action against Grand Prairie Ford to recover damages for

three counts of deceit and fraud in a Texas State trial court.[2] Grand Prairie Ford lied to the petitioner during several auto service visits about his engine having oil where in fact there was no oil in the engine; and subsequently, there was serious injury.[3] Grand Prairie Ford filed a vexatious litigate plea which pursuant to statute shifts entire burden of persuasion and production of evidence from the petitioner to Grand Prairie Ford.[4] In the instant case, Grand Prairie Ford has the burden of raising evidence to reduce the petitioner's recovery.[5] At a hearing, whereby the petitioner was absent, the State court granted Grand Prairie Ford's motion deeming the petitioner a vexatious litigant and their request for a $2,500.00 security.[6] The face of the record shows Grand Prairie Ford did not produce argument nor evidence to prove the petitioner's complaint was *groundless*.[7] Notwithstanding Grand Prairie Ford's no response to the petitioner's no evidence complaint filed September 11, 2006, trial court sustained Grand Prairie Ford's vexatious litigate and a request for security of $2,500.00 verdict.[8] Trial court issued a final judgment on September 26, 2006.[9]

Subsequently, the petitioner's request for Facts and Conclusion of Law was denied.[10] On appeal, the petitioner's request for an oral argument was

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[2] *CR 2..*

[3] *Id.*

[4] *Tex. Civ. Prac. & Rem. Code § 11.052., App., infra, 16a.*

[5] *Id., Tex. R. Civ. P. 166(a)(i).*

[6] *Op., App., infra, 1a-10a.*

[7] *Id., Tex. R. Evid. § 401 & 402, Restat. 2d. Torts § 525 (1977).*

[8] *CR 69, 1st Suppl. CR 27.*

[9] *CR 160.*

[10] *CR 197, App. infra, 11a.*

denied.[11] On July 19, 2007, the 2nd District of Texas Court of Appeals affirmed trial court's decision.[12] A subsequent motion for rehearing was denied.[13] On August 8, 2008, the Supreme Court of Texas denied the petitioner's petition for review; and, on April 4, 2008, the Texas Supreme Court denied the petitioner's motion for rehearing.[14] The Texas Supreme Court decision implicated an issue of constitutionality of a Texas vexatious litigant statute for the United States Supreme Court.[15]

REASONS FOR GRANTING THIS PETITION

I.

THE STATE COURT'S INTERPRETATION OF THE WILL OF THE STATE LEGISLATURES ABRIDGED A RIGHT TO A VERDICT SUPPORTED BY EVIDENCE PRESENTED UNDER THE FIRST AND FOURTEENTH AMENDMENT

The State court's ruling on defendant's right to a security and a stay, as stipulated by a Texas vexatious litigant statute, infringed upon the petitioner's fundamental due process right.[16]

a.

A Fundamental Due Process Right Defined.

A fundamental [due process] right is defined, by Black's Law Dictionary, as "those [due process] rights which have their source, and are explicitly or implicitly guaranteed, in the Federal constitution." "A

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[11] *On file with clerk.*

[12] *App., infra, 1a-10a.*

[13] App., *infra, 12a.*

[14] *App., infra, 13a.*

[15] *Id.*

[16] *U.S. Const. amend. I & XIV, § 1.*

right to a verdict supported by evidence presented" is implicitly guaranteed by the First amendment "right to petition" clause and the Fourteenth amendment "right to equal protection" clause of the Federal constitution. Furthermore, Black's Law Dictionary, under "due process of law," defines a right to a verdict supported by evidence presented as a fundamental due process right. A right to a verdict supported by evidence is synonymous with a no evidence complaint. Tex. R. Civ. P. 166(a)(i). A no evidence complaint demands a verdict to be supported by evidence presented. Id. A no evidence complaint, because of its basis in our Federal constitutional right to a verdict supported by evidence, guarantees a moving party a response to stated elements at which the moving party asserts there is no evidence. Id. Or as a part of satisfying fundamental due process, the court is duty bound to grant a moving party's no evidence motion for summary judgment. Id. The next section will prove – the source at which a right to a verdict supported by evidence is granted is the Federal constitution. Every citizen is granted a fundamental due process right, and this fundamental due process right can not be abridged by any law or action of the State. U.S. Const. amend. I & XIV, § 1.

b.

A Right to a Verdict Supported by Evidence Presented is a Corollary of a Right to Petition the Government for a Redress of Grievances – A Fundamental Due Process Right.

The United States constitution First amendment says it is unconstitutional for a law to infringe upon a right to a verdict supported by evidence presented. The "right to petition" clause under the First amendment grants every citizen a right to a verdict

supported by evidence presented. The "right to petition" textual meaning is derived from the Black's Law Dictionary 6th edition definition of "petition," "redress," and "grievances," and it means the court must issue a verdict on a cause of action which is supported by a recital of facts or evidence presented. The word "petition" contributes most to the substantive meaning of the First amendment clause and it is define as a filing of "a formal written application requesting judicial action on a certain matter. A recital of facts given rise to a cause of action;" and, "Redress" is defined as the "satisfaction for an injury or damages sustained;" and, the word "Grievances" is defined as an injury, injustice, or wrong which gives ground for complaint because it is unjust, discriminatory, and oppressive." Redress and grievances contributes the least to the substantive meaning of the First amendment clause. Given the weights, the Black's Law Dictionary defines a "right to petition" as right to a "recital of facts" to support a verdict. A "right to petition" is the equivalent of a right to a verdict supported by evidence presented which is synonymous with a right to a no evidence complaint. Tex. R. Civ. P. 166(a)(i). A no evidence complaint demands a verdict supported by evidence presented. Id. Thus, a right to a verdict supported by evidence presented is the corollary of a right to petition the government for a redress of grievances of the First amendment. U.S. Const. amend. I, § 1. A no evidence complaint is a fundamental due process right protected by the First amendment of the United States constitution. Id.

c.

A Right to a Verdict Supported by Evidence Presented is a Corollary of Right to Equal Protection of the Laws – A Fundamental Due Process Right.

The right to equal protection under the Fourteenth amendment grants every citizen a right to a verdict supported by evidence presented. The right to equal protection of the laws is a "pledge of the protection of equal laws" i.e. the equal enforcement of laws and the demand that the law itself be "equal." [17] The mediating principle of the equal protection clause, as applied to this case, is an arbitrary verdict is unconstitutional.[18] An arbitrary verdict, in accordance with Black's Law Dictionary, means a verdict without consideration or regard for evidence or law. In essence, a verdict without support of evidence or law is arbitrary, and a violation of the equal protection clause of the Fourteenth amendment. A right to equal protection, or better viewed as a right to immunity from arbitrary discrimination, is the equivalent of a right to verdict supported by evidence presented which is synonymous with a right to a no evidence complaint. Tex. R. Civ. P. 166(a)(i). It is a no evidence complaint which demands a verdict to be supported by evidence presented. Id. Thus, a right to a verdict supported by evidence presented is the corollary of the equal protection clause of the Fourteenth amendment. U.S. Const. amend. XIV, § 1. A no evidence complaint is a fundamental due process right protected by the

[17] Frederick Schauer, *The Philosophy of Law Classic and Contemporary Readings with Commentary* (1996)(reviewing Tussman and Tenbroek. *The Equal Protection of Laws*. pg. 547)

[18] Id.,(reviewing Owen M. Fiss., *Groups and The Equal Protection Clause*, pg. 555.)

Fourteenth amendment of the United States constitution. Id.

Conclusion

The petitioner's right to a no evidence complaint has its source in the Federal constitution. The petitioner's right to a no evidence complaint secured to him by a "right to petition" under the First amendment clause and a "right to immunity from arbitrary discrimination" under the Fourteenth amendment clause, as applied to the States by the due process clause under the Fourteenth amendment, was abridged by the Texas vexatious litigant statute. The Fourteenth amendment states "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States."

II.

BREACH OF DUE PROCESS OF LAW

Overview

This Appellate review is a review of a plaintiff and defendant's summary judgment motion whereby each motion asserts thier opponent has no evidence to weigh; thus, they are entitle to summary judgment as a matter of law. In the instant case, we have a petitioner's no evidence motion for summary judgment (CR 132) and a defendant, Grand Prairie Ford, vexatious litigant motion for summary judgment (CR 26) whereby each asserts the other has no evidence to weigh; and both motions on appeal are dispositive motions. However, by law, the petitioner's no evidence motion is a responsive motion. Tex. R. Civ. P. 166(a)(i). Due process is satisfied when Grand Prairie Ford satisfies its burden of proof on their

claim that the petitioner's complaint is *groundless*, then the plaintiff receives zero recovery; if they do not, the plaintiff receives full recovery. Id., Tex. Civ. Prac. & Rem. Code Ann §§ 11.051 - .056. Not only is it the nature of Grand Prairie Ford's trial court contributory negligence plea in their vexatious litigant motion which place this case under an "all or nothing" doctrine but also it is the fact that Grand Prairie Ford has no defense in their answer,[19] and no response to reduce recovery to a no evidence complaint.[20] Notwithstanding Grand Prairie Ford's no response to an evidentiary docket call, (1st Suppl. CR 27) the State court granted a decision in favor of Grand Prairie Ford. The State court decision is contrary to Texas Rules of Civil Procedure rule 166(a)(i) which states "After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact." Contrary to law, the State court justified not granting

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[19] *See* Second District of Texas Court of Appeals' Appellant Brief, pg. 5, para. 1 ln 1 where the petitioner states "As evident by record, the plaintiff made several complaints (i.e. no defense, no evidence, and no answer) seeking an amendment of written pleadings, *See* CR 8 (complaint), CR 75, 76, & 111 (objection to Order dtd 11 Jul 06), CR 93, 95 (pltf. motion to extend time), CR 155 (notice of no evidence motion), CR 163 (motion for no answer default judgment). In addition, Grand Prairie Ford admitted damages pursuant to T.R.C.P. 93(12) statute. CR 18. At trial court, Grand Prairie Ford presented no arguments."

[20] *Tex. R. Civ. P. 166(a)(i).*

the petitioner's judgment with a Texas vexatious litigant statute grants a right to a security and stay which outweighs the petitioner's constitutional right to a no evidence complaint. Op., App., infra, 7a.

State Trial Court Proceedings.

Due process of law begins with a party who has been serviced entering their best case for a verdict: a case for the judgment a party shall recover. A party can enter a case for no recovery under a contributory negligence or "all or nothing" doctrine, or a party shall recover an "ABC" percentage of an "XYZ" amount of damages under a comparative fault doctrine, or a party may enter a case for a judgment whereby recovery is an "XYZ" amount of damages under a statute or contract.

The Parties Enter Their Case.

The petitioner entered before the court a complaint for a judgment of $100 million for an action on three counts of deceit and fraud.[21] And, after Grand Prairie Ford filed a general denial answer to the petitioner's complaint,[22] they filed a Motion for Vexatious Litigant and Security verdict as a matter in avoidance.[23] Tex. R. Civ. P. 85. Essentially, Grand Prairie Ford entered a case for judgment of $2,500.00 under a Texas vexatious litigant statute whereby Grand Prairie Ford must prove their case for the petitioner's complaint of deceit and fraud as *groundless*. Id. A *groundless* action is defined by Black's Law Dictionary as a "failure to state cause of action."

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[21] *CR 2.*.

[22] *Op., App., infra, 3a.*

[23] *CR 26.*

The Trial.[24]

A vexatious litigant determination trial - Pursuant to Texas Civil Practice & Remedies Code section § 11.054, Texas vexatious litigant statute, the entire burden of persuasion and production of evidence, in the instant case, to reduce recovery is shifted to the defendant, Grand Prairie Ford;[25] The Texas vexatious litigant statute states "A court may find a plaintiff a vexatious litigant if the defendant shows there is not a reasonable probably that the plaintiff will prevail in litigation against the defendant."[26] The State court's interpretation of vexatious litigant statute's due process requirement is noted in the court's opinion which states "We first note that § 11.054 [a criteria for finding a vexatious litigant] does not require conclusive evidence." Op., App., infra, 8a. This interpretation means Congress drafted a vexatious litigant statute that heavily favored limiting *groundless* suits over the value of hearing legitimate claims. Id. In other words, in order for a plaintiff's case to survive a vexatious litigant determination trial, the plaintiff's complaint not only must satisfy a merit determination standard of upon assuming all averments are true, there must exist a cause of action, but also the plaintiff's complaint must survive a less than conclusive evidence challenge offered by the defendant. Id. [27] In this case, a

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[24] Black's Law Dictionary defines "trial" as a "judicial examination and determination of issues between parties to action, whether they be issues of law or fact, before a court that has jurisdiction."

[25] *Id.*

[26] *Tex. Civ. Prac. & Rem. Code Ann §§ 11.000., App., infra, 16a.*

[27] The State court rule of law which states conclusive evidence is not necessary to find a vexatious litigant means the defendant can present evidence raising a fact contention and the plaintiff's case would not survive a vexatious litigant determination. In order for

legitimate claim will more likely than not be eliminated due to criteria for finding a vexatious litigant "does not require conclusive evidence." Id.

In the instant case, substantive due process of law is satisfied when Grand Prairie Ford proffer evidence to prove the petitioner was not *justifiably reliant* upon Grand Prairie Ford's auto technicians to his detriment. U.S. Const. amend. XIV, § 1. This due process evidentiary requirement is in accordance Restatement Torts § 525 deceit and fraud liability law under the substantive due process clause of the Fourteenth amendment. Id. The Fourteenth amendment due process clause protects a citizen's substantive rights against arbitrary and unreasonable government action. Id.

Grand Prairie Ford, the defendant, has the burden of proof. The "Appellee [Grand Prairie Ford] argued that Appellant [petitioner] suit was groundless"[28] (App., *infra*, 3a.) and "Appellant had refused the services recommended by Appellee..." (App., *infra*, 3a.) with the intent to confuse and mislead the court into believing the petitioner acted in a negligent manner which contributed to his injury. The court will find Grand Prairie Ford's arguments are without merit and not applicable for the following reasons: 1) Grand Prairie Ford presented a false case, and 2) Grand Prairie Ford presented irrelevant evidence.

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the plaintiff to survive vexatious litigant determination under current Texas State rule of law evidentiary standard is to present a case where no fact contention can be raised.

[28] A *groundless* action is determined after assuming all averments alleged in the petitioner's complaint are true, and then facts asserted would not establish a cause of action. Black's Law Dictionary.

First, Grand Prairie Ford presented a false case by presenting an unlawful defense for deceit and fraud. When you take Grand Prairie Ford years of legal experience and the petitioner's case for deceit and fraud in consideration, it is crystal clear that Grand Prairie Ford had an intent to mislead and confuse the court with an argument of "Appellant suit was groundless."[29] Grand Prairie Ford & Jones & Cannon 65 years of combined legal experience in litigation of fraud claims would not have cause an overlook of legal defenses to a deceit and fraud cause of action without it being an intentional action. A perusal of a legal text book will show Grand Prairie Ford presented a false case. For example, in accordance with Richard A. Epstein, *Cases and Materials on Torts (6th ed. 1995)*, contributory negligence is not a legal defense for fraud, an intentional tort. In accordance with William P. Statsky, *Torts Personal Injury Litigation (2nd ed. 1990)*, contributory negligence is never a defense to any of the intentional torts that a defendant might commit. Under a comparative fault doctrine, Restatement (Third) of Torts - Apportionment of liability § 1, recovery is not reduced against an intentional tortfeasor. Comparative fault is not applicable in an intentional tort cause of action. In accordance with Dan B. Dobbs, *Torts and Compensation (4th ed. 2001)*, in a fraud action, liability is reduced to a question of "justifiable reliance." And, finally, the controlling substantive law on deceit and fraud, Section 525 of the Restatement (Second) of Torts, reduce an action of fraud to "a misrepresentation of fact" and "his [a party] justifiable reliance upon the misrepresentation." All

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[29] *Id.*

legal text book sources state "justifiable reliance" is an essential element of proof for fraud. The petitioner's *alleged* negligence contributed to his injury is not only false but also it is not applicable as a case to say the petitioner's complaint is *groundless*.[30]

Second, Grand Prairie Ford presented irrelevant evidence. Grand Prairie Ford assertion of the petitioner "...refused the services recommended..." (Op., App., *infra*, 3a.) is false and irrelevant evidence. Fed. R. Evid. § 401, § 402, Tex. R. Evid. § 401, § 402. The petitioner has a Federal and State right to verdict supported by evidence having a tendency to make existence of a fact that is of consequence to the determination of a *groundless* complaint more probable or less probable than it would be without the evidence. Id. Grand Prairie Ford's assertion of "refused the services recommended" as evidence has no logical and relevant connection to "a misrepresentation of fact" and "[petitioner's] justifiable reliance upon the misrepresentation" which caused his injury. Id., Restat. 2nd Torts § 525 (1977). The petitioner and Grand Prairie Ford produced the following document(s) from Ford service department. The document(s) #1 & #2 show a misrepresentation of fact:

Document(s) #1.

(CR 10-12)

A Ford document shows, on three separate occasions, a Grand Prairie Ford auto technician indicated on a Ford Motor Company safety inspection form (Ford-QC Rev. 12/04 132532) in the top left corner under a highlighted heading of "Check Fluid

[30] *Id.*

Levels and Fill" engine oil is OK.[31] Under the highlighted heading of "Check Fluid Levels and Fill" there are two columns.[32] One column with a heading of "OK" and the other column with heading "Fill."[33] There are three rows under the heading of "Check Fluid Levels and Fill" one of which is an "Engine oil" row.[34] In the box under the highlighted heading "Check Fluid Levels and Fill" and the "OK" column a box in the "engine oil" row was checked indicating the engine oil is "OK."[35] A Ford certified auto technician signed the form in a signature block located in the bottom left hand corner to indicate to the customer that a Ford certified inspection is complete.[36]

Document(s) #2.
(CR 13)

A Ford document shows a Ford certified auto technician indicating on a Ford Motor Company safety inspection form in the comment section petitioner's entire "engine assembly" needs to be replaced due to "engine slugged" broken internal engine parts are "noisy."[37]

In view of Chief Justice Philips, a former Texas Supreme Court Justice, rendition of Tex. R. Evid. and Fed. R. Evid. Rule 401 & 402 underline philosophy, Grand Prairie Ford's evidence "Appellant [petitioner] had refused the services recommended by Appellee..." is liken to a "sun on the horizon" whereby one can not

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[31] *CR 10.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *CR 13.*

infer that the sun is either on a "sunrise" or "sunset;" neither possibility is more likely than the other. Thus, no inference can be drawn. One can not infer that there is evidence to prove the petitioner was not *justifiably reliant* on Ford auto technician certified safety inspection report stating no oil change is needed. It is a rule of logic, as well as well settled law, that when the existence of a fact does not make one possible inference more probable than the other, no inference can be drawn at all. Federal and State law does not allow the court to give weight to Grand Prairie Ford's evidence. Op., App., infra, 3a., Fed. R. Evid. § 402, Tex. R. Evid. § 402. Pursuant to Federal and State law on evidence, evidence which is not relevant is inadmissible. Id.

Therefore, in consideration of a *groundless* or vexatious litigant action, the trial court decision is mechanical in nature. Did Grand Prairie Ford prove the petitioner was not justified in relying on Ford auto technician's written safety inspection report to his detriment? The answer is NO. The State court opinion shows Grand Prairie Ford, who had the entire burden, presented no evidence or argument refuting the petitioner's complaint of an injury due to his justifiable reliance on a misrepresentation of fact. Op., App., infra, 8a.

The Verdict.

On September 11, 2006, the petitioner filed a no evidence motion for summary judgment because 1) Grand Prairie Ford had the entire burden of persuasion and production of evidence at a vexatious litigant determination trial;[38] and 2) Grand Prairie Ford's assertion of "refused the services

[38] *Tex. R. Civ. P. 166(a)(i).*

recommended" as evidence has no logical and relevant connection to "a misrepresentation of fact" and "[petitioner's] justifiable reliance upon the misrepresentation" which caused an injury.[39] It is a well settled legal principle that a no evidence complaint call for setting aside a court's ruling until evidence is satisfied. The Tex. R. Civ. P. 301, states the court may, upon a motion and notice, disregard or set aside a verdict issued by a State court that has no support in evidence. The petitioner filed a motion and notice upon the court complaining about a verdict with no evidence; and, in accordance with law, the State court verdict was to be set aside. Contrary to law, the State court verdict was not set aside. And, although a response was mandated by law to reduce recovery, Grand Prairie Ford did not respond to a State court scheduled evidentiary docket call (*See* 1st Suppl. CR 27 where Judge Jeff Walker pin and ink "September 15 2006" to reflect the date of his request for evidence and made his signature by a court scheduled pin and ink date of "Oct 26, 2006 AT 3:00pm" for docket call for evidence after a de novo hearing on a no evidence objection) nor did Grand Prairie Ford provided a written response to the petitioner's no evidence motion. Instead, on September 26, 2006, in the petitioner's absence, trial court signed and entered a final judgment in favor of Grand Prairie Ford. Court of Appeals justification for State trial court action is cited in its opinion. App., infra,7a. The court states "litigation was stayed when Appellee [Grand Prairie Ford] filed its motion to declare Appellant [petitioner] a vexatious litigant, and because Appellant never deposited the security

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[39] *Fed. R. Evid. § 401 & 402, Tex. R. Evid. § 401 & 402, & Restat. (Second) Torts § 525.*

ordered by the trial court, § 11.052 [stay] relieved Appellee of the burden of responding to Appellant's [no evidence] motion. *See* Tex. Civ. Prac. & Rem. Code Ann § 11.052. Finally, because Appellant failed to deposit the security within the time ordered by trial court, the trial court properly dismissed this claims under the mandatory dismissal provision of § 11.056. *See* id. § 11.056. For these reasons, we hold the trial court did not deprive Appellant of his right to due process of law.... " Op., App., infra, 6a.

Conclusion.

The court interprets the vexatious litigant statute to mean a right to a security and stay outweigh a constitutional right to a no evidence complaint. A no evidence complaint demands an evidentiary response. TRCP 166a(i). Because a no evidence complaint has a basis in a Federal constitutional right to a verdict supported by evidence, satisfying a no evidence complaint with a response is not a moot issue; it is a fundamental due process of law issue protected from State encroachment by the Fourteenth amendment. U.S. Const. amend. XIV, § 1. Because the State court did not conform Restatement (second) Torts § 525 and Texas Rules of Civil Procedure rule 166a(i) due process evidentiary requirement, the State court's ruling not only disregarded Federal and State law but also placed emphasis on values not fundamental to our society. Id. No response serves as justification and evidence to support a verdict for the plaintiff's judgment as a matter of law. No response to a no evidence complaint is a breach of due process of law. Id. This fundamental due process right can not be abridged by any law or action of the State. Id., U.S. Const. art. VI, § 2. Boldly, there is a conflict between

the United States constitution and the Texas vexatious litigant statute.

III.

TEXAS VEXATIOUS LITIGANT CLASSIFICATION VIOLATES THE EQUAL PROTECTION CLAUSE

The Texas vexatious litigant statute presents a set of arbitrary laws which are unconstitutional. U.S. Const. amend. XIV, § 1. Below is a quote from Frederick Schauer & Walter Sinnot-Armstront authors of *The Philosophy of Law Classic and Contemporary Readings with Commentary* (1996). The quote shows arbitrary laws fail the rational relation test.

> So the courts decided early on that it was not their business, according to the accepted separation of powers, to examine details of legislation to make sure that the laws were as equitable as possible. Instead, the court initially saw laws as violating the Equal Protection Clause only when they failed what became known as the rational relation test. This test required only that the law have some legitimate goal and that it not be unreasonable to believe that unequal treatment would serve that goal... The rational relation test put limits on over-inclusiveness and under-inclusiveness, but these limits were very wide. The only laws that fail this test are laws that are obviously arbitrary.
>
> Id. at 544-545.

In a statutory analysis, the Texas vexatious litigant statute fails not only a *strict scrutiny* test but also *rational relation* test. The Texas statute, in operation, is under-inclusive with regard to a class of

litigants and over-inclusive with regard to *groundless* cases. Both classifications are obviously arbitrary and unreasonable: 1) Texas has (4) four laws which are considered the *only* less over-inclusive way of serving the same *perceived* goal as the Texas vexatious litigant statute: the Texas vexatious litigant statute is not warranted. 2) the statute infringe upon a fundamental right; 3) the statute has an evidentiary standard which put the court at risk of not hearing legitimate lawsuits; 4) the statue, in operation, divide petitioners into two unreasonable classes – those who are attorneys and those who are not for the purpose of abridging a right to petition; 5) the statute has a disparate impact on a class of poor non attorney litigant; 6) the statute, in operation, treats non attorney litigants with hostility and prejudice; 7) the statute is not modeled after a similar Federal *in forma pauperis* statute which serves to curb groundless suits generated by the poor. Thus, as a consequence of the above mention factors, the Texas statute, in operation, inevitably creates and sustains a permanent under class of victims. The Texas statute does not serve a State protected interest of the 1st amendment and 14th amendment.

1) The Texas vexatious litigant statute is not warranted. There are (4) four laws which are considered the only less over-inclusive way of serving the same *perceived* goal as the Texas vexatious litigant statute. The Texas vexatious litigant statute lacks justification for its existence. There is no evidence showing *groundless* lawsuits harm defendants to the extent additional measures are warranted above and beyond existing Federal and State law. *See* Fed. R. Civ. P. (12)(b) or Tex. R. Civ. P. 94, whereby both laws authorize dismissal for failure to state cause of action (sometimes referred to as

demurrer), and Fed. R. Civ. P. 11 or Tex. R. Civ. P. 13, whereby both laws authorize sanctions for groundless pleadings. *See* also the State enacted, Tex. Civ. Prac. & Rem. Code Ann §9.00, a Texas statute entitled "Frivolous Pleading and Claims" which authorizes sanctions for groundless claims, and Tex. Civ. Prac. & Rem. Code Ann §10.00, a Texas statute entitled "Sanctions for Frivolous Pleadings and Motions" which authorizes sanctions and a dismissal for a groundless claims. These (4) four laws in addition to putting a stop to a State court practice of issuing vague and ambiguous orders is sufficient to satisfy a *valid* goal. The Texas vexatious litigant statute is not warranted.

2) The Texas vexatious litigant statute infringe upon a fundamental due process right. The State court interprets the vexatious litigant statute to mean a right to a security and stay outweigh a right to a no evidence complaint, and this interpretation is not only beyond the vexatious litigant statute textual meaning but also outside the bounds of constitutional limits. Tex. Civ. Prac. & Rem. Code Ann §§ 11.052, U.S. Const. amend. I, § 1, U.S. Const. amend. XIV, § 1. The Texas vexatious litigant statute is so broad it punishes and penalizes conduct protected by the Equal Protection Clause of the United States constitution. Id. The State court in its opinion states due to a stay, the court has the right to deny a no evidence complaint demanding a vexatious litigant verdict to be supported by evidence. This demand is a right protected by the equal protection clause. *See* Court of Appeals opinion where it states "11.052 [stay] relieved Appellee of the burden of responding to Appellant's [no evidence] motion." (App., *infra*, 7a.) A stay classification, in operation, is arbitrary and unreasonable. The stay is assigned to prohibit a no

evidence challenge, which is a fundamental due process right. A stay classification is arbitrary, and it infringes upon a fundamental due process right. It is unreasonable to believe unequal treatment of the petitioner with regards to a no evidence complaint would serve a *valid* goal.

3) The Texas vexatious litigant statute has an evidentiary standard which put the court at risk of not hearing legitimate lawsuits. The Texas vexatious litigant statute, in operation, shifts a normative evidentiary standard of conclusive evidence to less than conclusive evidence is required for summary judgment on a vexatious litigant motion. This shift lends to an over-inclusive policy with regard to cases the vexatious litigant statue would deem *groundless*. Tex. Civ. Prac. & Rem. Code Ann §§ 11.051-.056. *See* State court opinion where the state court cites "We first note that § 11.054 [criteria for finding a vexatious litigant] does not require conclusive evidence." Op., App., infra, 8a. The Texas vexatious litigant statute, in operation, means a defendant's evidence which place a fact in contention is strong enough for finding of a vexatious litigant. Id. Thus, in order for a plaintiff's case to survive a vexatious litigant determination trial and appeal, the plaintiff must present a case where no fact contentions can be raised. Id., Tex. Civ. Prac. & Rem. Code Ann §§ 11.051-.056. It is unreasonable to believe that unequal treatment of a litigant with a *prima facie* case and a history of lawsuits losses would serve a valid goal. It is apparent that the vexatious litigant statue would much rather run the risk of dismissing legitimate claims.

4) The Texas vexatious litigant statue, in operation, has a bias and prejudice against non

attorney litigants in efforts to preserve the practice of law to licensed attorneys only. No licensed attorney has been deemed a vexatious litigant.[40] Due to a Texas State court rule of law which is a vexatious litigant determination "does not require conclusive evidence" and the court's bias and prejudice against non attorney litigants, it is *more likely than not* a non attorney litigant will be deemed a vexatious litigant when there is a fact challenged by the defendant. Id. The Texas vexatious litigant statute is under-inclusive. This fact is made evident by the fact that no license attorney who has lost five cases within a seven year period has ever been deemed a vexatious litigant.[41] It is evident the Texas vexatious litigant statute, in operation, divide petitioners into two unreasonable classes – those who are attorneys and those who are not, one class being permitted, while the other is forbidden to lose no more than five cases within a seven year period or suffer from an additional administrative proceeding and a penalty in the form of a security. It is unfair for non attorneys to be penalize for seeking the court's "say on what the law is." Chief Justice John Marshall in *Marbury v. Madison* said "it is emphatically the province and the duty of the judicial department to say what the law is." To the contrary, the Texas vexatious litigant statute penalizes non attorney litigants who seek the judicial departments say on what the law is. It is

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[40] Notes did not show a licensed attorney as a vexatious litigant. Erin Schiller, & Jeffery A. Wertkin, Note, *Frivolous filings and Vexatious litigant*, Georgetown Journal of Legal Ethics, (Summer 2001). *See* also Lee W. Rawles, Note, *The California Vexatious Litigant Statute: A Viable Judicial Tool to Deny the Clever Obstructionists Access?* 72 S. Cal. L. Rev. 275 (1998).

[41] Id.

unreasonable to believe that treatment of non attorneys differently than attorneys would have a rational relation with judicial department duty to say what the law is. A request of the court to say "what the law is" is not *frivolous* or *groundless* – it is a citizen's duty as *implicitly* expressed in *Marbury v. Madison*. Within the meaning of the First and Fourteenth amendment is a guarantee of equal treatment irrespective of a litigant "attorney or non attorney" status or how many cases lost in a given year. There is no empirical evidence which shows unequal treatment of a non attorney litigant filing a *prima facie* case with a history of lawsuit losses increases the litigant's chance of equal access to justice. The Texas vexatious litigant statute produces just the opposite. It prohibits access to justice.

5) The Texas vexatious litigant statute has a disparate impact on a class of poor non attorney litigant. Within a class of non attorney litigants is a class of poor litigants who are harmed the most by maintaining the Texas vexatious litigant statute. The statute authorizes issue of a monetary restrictive covenant under the pretext of covering "moving defendant's reasonable expenses incurred" in litigation. The penalty serves as financial barrier, a mechanism for increasing the cost of filing a future petition. But for a Texas vexatious litigant imposed financial barrier, the poor lack access to the court for protection of their liberty and property rights which are rights necessary to create and sustain a social and economic advantage in our free and civilized society. The wealthy can easily overcome this financial barrier; it is the poor who suffer the most from an increase cost of justice. When a poor non attorney litigant loses more than five cases within seven years, the court orders payment of a monetary penalty or

the non attorney litigant is prohibited from filing a petition in a Texas court. Tex. Civ. Prac. & Rem. Code Ann §11.055, §11.056 and §11.101. Upon the court's determination of vexatious litigant, a clerk of a court will not file a new litigation presented by a vexatious litigant unless a local administrative judge issues an order permitting the filing. Id., §11.103(a). In the event, a local administrative judge abuses her discretion by refusing to grant a litigant a right to petition the government to resolve a grievance. The aggrieved litigant, in a hostile environment, is without an appeal. Id. Since there is no official filing with the clerk, the aggrieved litigant efforts to resolve their grievance are informal and off record. Id. The aggrieved litigant is without a Clerk's Record or Court Reporter's transcript. Id. As the Texas vexatious litigant statute exist today, each vexatious litigant subject to a security, stay and pre-filing order is barred indefinitely from filing a new action with a State court clerk without receiving permission from an administrative judge and satisfying a security. Id. Annually, The Office of Court Administration of Texas Judicial System sends a list of vexatious litigants prohibited from a filing a petition with a Texas court to all clerks of the courts of the State of Texas. Id., § 11.104(b). Since litigants have a limitation on the number of lawsuit loses, it is foreseeable that non attorney litigants seeking the court's say on what the law is will eventually be deemed a vexatious litigant in the State of Texas due to a State court bias.

6) The Texas vexatious litigant statute, in operation, treats non attorney litigants with hostility and prejudice. Often a non attorney litigant of a minority or poor class or both exp erience a Texas court room culture framed with a State court judge

acting as a referee, a sleeping court reporter, bailiff and a deceitful opposing counsel. Opposing counsel presents a false case, and carry a belief that he has no legal duty to the court that outweigh his duty to his client to the extent of disclosing to the court when there is no evidence. Given these circumstances what chances of winning does one have, particularly, when court room deceitful behavior is immersed in a culture whereby the State court judge will only sign orders prepared by a license attorney. And, the first notice of a signed vague and ambiguous verdict is via mail whereby the court claims everything is final! Although Texas State legislatures are aware of Texas court room bias and thier attorney's sentiment toward non attorney litigants, the State legislatures have yet to create incentive for licensed attorneys to take less than sexy cases by either creating a civil justice act, model after the criminal justice act, or establishing a law prohibiting a licensed attorney from refusing to take a non attorney's case. Due to the fact that Texas State courts have a history of not appointing an attorney to represent a non attorney in a civil matter, coupled with the fact that there is no empirical evidence showing the Texas vexatious litigant statute serves a compelling state interest or legitimate goal of increasing equal access to justice, it can be inferred that Texas State legislatures and Texas courts have an intent of treating non attorney litigants with hostility and prejudice.

7) The Texas vexatious litigant statute is not analogous to a Federal *in forma pauperis* statute. The Federal government has a Federal *in forma pauperis* statute, 28 U.S.C. § 1915(g), which places a restriction on privileges such as a waiver of a filing fee extended to an *in forma pauperis* class of litigants when there are three or more *groundless* suits filed.

The Federal *in forma pauperis* statute unlike the Texas vexatious litigant statute does not put at risk the creation of a permanent under class of victims. The Federal statute does not deny an *in forma pauperis* class of litigants any right extended to its normative population of litigants where as the Texas vexatious litigant statute does. The Federal *in forma pauperis* statute says, in event of three or more loses, an *in forma pauperis* litigant must be "under imminent danger of serious physical injury" for a waiver of his filing fees.[1] A Texas vexatious litigant statute does not offer a waiver of a filing fee, in fact, the statute effectively raise a barrier to justice by requiring payment of a security prior to any new filing with a Texas court. This Texas state legislative scheme put courts at risk of creating a permanent under class of victims. An *in forma pauperis* class of Federal litigants have a special privilege without sacrificing the same unabridged right to petition the court extended to all other Federal litigants. In the end, for a litigant with several loses before a Federal court there is no risk of losing the same unabridged right to petition the court offered to its normative population of litigants. A litigant with several loses before a State court will lose an unabridged right to petition the court extended to its normative population of litigants.[1] The Federal *in forma pauperis* statute does not put the court at risk of creating a permanent under class of victims; however, the Texas vexatious litigant statute does.

Conclusion

The Texas vexatious litigant statute is designed to operate in a fashion whereby the only way a non attorney litigant can avoid a rail road into a malicious label and substantial monetary sanction for having a

history of losing at least five cases within seven years is to 1) present a case whereby no fact contention can be raised or 2) have an appointed attorney or 3) be a licensed attorney. The obvious intent of the Texas vexatious litigant statute is to regulate the practice of law to licensed attorneys only. Boldly, there is a conflict between the United States constitution and the Texas vexatious litigant statute. U.S. Const. amend. I & XIV, § 1. The vexatious litigant statute goal is neither legitimate nor *valid* because it conflicts with the 1st amendment right to petition.

IV.
THE TEXAS VEXATIOUS LITIGANT STATUTE IS REPUGNANT TO THE UNITED STATES CONSTITUTION

The United States constitution is a source of rights protected by the Fourteenth amendment and Supremacy Clause. U.S. Const. amend. XIV, § 1., U.S. Const. art. VI, § 1. The Fourteenth amendment of United States constitution guarantee no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law. Id. The privilege or immunities clause by definition are rights conferred by the United States constitution such as the First amendment "right to petition" clause and the 14th amendment "right to equal protection" clause. Id., U.S. Const. amend. I, § 1. Rights granted under the privilege or immunity clause are protected by the Fourteenth amendment. Id. A right to a no evidence complaint is a right conferred by the Federal constitutional right to a verdict supported by evidence. Id. A right to a no evidence complaint is secured not only under the

"right to petition" clause of the First amendment but also under the "right to equal protection" clause of the Fourteenth amendment. Id. In addition, Federal and State law i.e. Fed. R. Civ. P. 56 and Tex. R. Civ. P. 166(a)(i) grants every litigant a right to a no evidence complaint. Id. Thus, a no evidence complaint is a privilege; or, better viewed as a right to immunity from arbitrary discrimination which can not be abridged by any action of the State. Id. The Fourteenth amendment due process clause secures an additional guaranty against any encroachment of these rights by the States. Id. In addition, the Supremacy Clause of Art. VI § 2 of the United States constitution declares that all laws made in pursuance of the United States constitution and all treaties made under the authority of the Untied States shall be the "supreme law of the land," and "the judges in every State shall be bound" and shall enjoy legal superiority over any conflicting provision of a State law. Henceforth, a no evidence complaint (a constitutional right) outweighs Grand Prairie Ford's right to a security and stay (a statutory right) granted by the Texas vexatious litigant statute. U.S. Const. amend. XIV, § 1., U.S. Const. art. VI, § 2.

V.

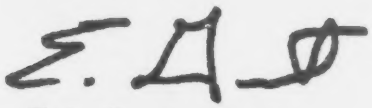
INJURY

The most egregious harm in a free society is not having freedom. The petitioner's most offensive and harmful experience was when Grand Prairie Ford lied about his engine having oil when in fact it did not – resulting in serious injury; and subsequently, the State court denied the petitioner's right to a no evidence complaint. Op., App., infra, 7a. This right is secured and protected by the First and Fourteenth amendment of the United States Constitution, and it can not be abridged by any action of the state. U.S. Const. amend. XIV, § 1., U.S. Const. art. VI, § 2. Although unconstitutional, the State cited the Texas vexatious litigant statute as the authority for denial of a fundamental due process right. Id., App., infra, 7a. The State court's denial of the petitioner's right to a no evidence complaint eliminated the petitioner's ability to pursue social and economical activity. The State court's denial of the petitioner's right to due process caused harm, to the extent that it diminished the petitioner's probability of success in a free and civilized society. The society in which the petitioner lives has no public transportation; thus, there is a requirement of a vehicle in order to be free. No person living in a society in which their liberty or property rights are not, on the whole, respected is free. Denial of a fundamental due process right caused the petitioner irreparable harm. To date, this legal saga has deprived the petitioner of, *inter alia*, a vehicle for over two years.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully,



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Re-submitted: August 20, 2008.
Re-submitted: October 31, 2008.

PETITON FOR A WRIT OF CERTIORARI

APPENDIX

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COURT OF APPEALS

SECOND DISTRICT OF TEXAS

FORT WORTH

NO. 2-06-386-CV

ERIC GANT,
APPELLANT

V.

GRAND PRAIRIE FORD, L.P.,
APPELLEE.

FROM THE 96TH DISTRICT COURT OF TARRANT COUNTY

July 19, 2007

Per Curiam

JUDGMENT

This court has considered the record on appeal in this case and holds that there was no error in judgment of the trial court. It is the order of this court that the judgment of the trial court is affirmed. It is further ordered that Appellant shall pay all costs of this appeal for which let execution issue.

COURT OF APPEALS

SECOND DISTRICT OF TEXAS

FORT WORTH

NO. 2-06-386-CV

ERIC GANT,
APPELLANT

V.

GRAND PRAIRIE FORD, L.P.,
APPELLEE.

FROM THE 96TH DISTRICT COURT OF TARRANT COUNTY

MEMORANDUM OPINION[42]

Appellant Eric Gant, pro se, appeals from a trial court order dismissing his claims against Appellee Grand Prairie Ford, L.P. after Gant failed to fund a vexatious-litigant bond as ordered by the court. We affirm.

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[42] *See* TEX. R. APP. P. 47.4.

Background

Appellant sued Appellee for $100 million in damages for allegedly causing damage to the engine of his 1997 Ford Explorer by misrepresenting that the engine oil was ok when Appellant submitted the vehicle to Appellee for free inspections on three occasions. Appellee filed a general denial.

Appellee also filed a motion to deem Appellant a vexatious litigant. Appellee argued that Appellant's suit was groundless and that Appellant had filed eight other lawsuits in federal courts over the prior three years. Attached to Appellee's motion are documents showing that Appellant refused all vehicle services recommended by Appellee after each of the free inspections. Also attached to Appellee's motion are docket sheets reflecting eight lawsuits filed by Appellant, pro se, in federal district courts between 2002 and 2005. At least five of those lawsuits ended with the dismissal of Appellant's claims.

On July 11, 2006, the trial court signed an order finding Appellant to be a vexatious litigant, ordering him to deposit $2,500 into the registry of the court as security within thirty days of the orders date, and warning that if Appellant failed to pay the security within thirty days, his lawsuit would be dismissed without further notice. The trial court's docket sheet indicates that the trial court held a hearing on the motion and that Appellant failed to appear. No reporter's record has been filed with this Court.

Twenty days after the trial court signed the order, Appellant filed a motion to extend time to deposit the security, citing as good cause a litany of allegations against Appellee, apparently in an attempt to show that his claim had merit. Forty-two days later, Appellant filed a no-evidence motion for summary judgment on his claims.

On September 26, 2006, eighty-one days after it ordered Appellant to deposit the security, the trial court denied his motion to extend time and dismissed the suit with prejudice. Appellant filed a request for findings of fact and conclusions of law, which the trial court denied. This appeal followed.

Discussion

A. Vexatious-litigants statute

To put Appellant's issues into context, we turn to the vexatious-litigants statute, chapter 11 of the civil practice and remedies code. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 11.051-.056 (Vernon 2002). On or before the ninetieth day after a defendant files an original answer or makes a special appearance in a litigation in this state, it may move the court for an order determining that the plaintiff is a vexatious litigant and requiring the plaintiff to furnish security. Id. § 11.051. Upon the filing of such a motion, the litigation is stayed, and the moving defendant is not required to plead until ten days after the motion is denied or, if the motion is granted, ten days after the defendant receives written notice that the plaintiff has furnished the required security. Id. § 11.052.

The court must conduct a hearing to determine whether to grant the motion. Id. § 11.053. The court may consider any evidence material to the ground of the motion, including written or oral evidence and evidence presented by witness or by affidavit. Id. A court may declare a plaintiff a vexatious litigant if the defendant shows (1) that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and (2) among other things, that the plaintiff has commenced, prosecuted, or maintained in the seven-year period immediately preceding the date of the motion at least five litigations that have been finally determined adversely to the plaintiff. Id. § 11.054.

If the court determines that the plaintiff is a vexatious litigant, it must order the plaintiff to furnish security for the benefit of the moving defendant. Id. § 11.055. If the plaintiff fails to furnish the security within the time ordered by the court, the court must dismiss the litigation as to the moving defendant. Id. § 11.056.

B. Due process

In his first issue, Appellant argues that he was deprived of his right to due process of law because the trial court dismissed his lawsuit even though Appellee did not assert affirmative defenses to his claims or file a response to his no-evidence summary judgment motion. The gist of Appellant=s argument is that he was entitled to judgment as a matter of law because Appellee did not assert affirmative defenses or a summary judgment

response; thus, the trial court erred by dismissing his claims.

Appellee filed a general denial to Appellant=s claims. See TEX. R. CIV. P. 92. A general denial requires a plaintiff to prove every fact essential to his case and joins issue on all material facts asserted by the plaintiff except those which must be denied under oath. Shell Chem. Co. v. Lamb, 493 S.W.2d 742, 744 (Tex. 1973); see also TEX. R. CIV. P. 93 (listing pleas which must be verified). In contrast to a general denial, an affirmative defense does not seek to defend merely by denying the plaintiff's claims, but rather seeks to establish an independent reason why the plaintiff should not recover. Tex. Beef Cattle Co. v. Green, 921 S.W.2d 203, 212 (Tex. 1996). Thus, Appellee's general denial required Appellant to prove the essential elements of his claims, and Appellee was not required to assert an affirmative defense to contest Appellant's allegations.

Rule 166a(i) permits a party to move for a no-evidence summary judgment on the essential elements of a claim on which the adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i). At trial, Appellant would have the burden of proof on his own claims; thus, he was not entitled to a no-evidence summary judgment on those claims. Moreover, the litigation was stayed when Appellee filed its motion to declare Appellant a vexatious litigant, and because Appellant never deposited the security ordered by the trial court, § 11.052 relieved Appellee of the burden of responding to Appellant's motion. See TEX. CIV. PRAC. & REM. CODE ANN. § 11.052.

Finally, because Appellant failed to deposit the security within the time ordered by the trial court, the trial court properly dismissed his claims under the mandatory dismissal provision of § 11.056. See id. § 11.056.

For these reasons, we hold that the trial court did not deprive Appellant of his right to due process of law, and we overrule his first issue. For the same reasons, we overrule his third issue, in which he argues that Appellee committed Aprofessional misconduct by presenting an order of dismissal to the trial court without first answering his no-evidence summary judgment motion.

C. No evidence of vexatious litigation

In his second issue, Appellant argues that there is no evidence to support the trial court's finding that Appellant is a vexatious litigant. Appellant also argues that Appellee was required to present conclusive evidence that he is a vexatious litigant.

We first note that § 11.054 does not require conclusive evidence. By its express terms, the statute requires proof rising only to the level of a reasonable probability. TEX. CIV. PRAC. & REM. CODE ANN. § 11.054.

A legal sufficiency challenge may only be sustained when: (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact.

Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 334 (Tex. 1998), cert. denied, 526 U.S. 1040 (1999); Robert W. Calvert, "No Evidence" and "Insufficient Evidence" Points of Error, 38 TEX. L. REV. 361, 362-63 (1960). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could, and disregard evidence contrary to the finding unless a reasonable factfinder could not. City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005).

Appellee attached to its motion records showing that Appellant had refused the services recommended by Appellee after the free inspections. This is some evidence tending to support the trial court's implied finding that there was not a reasonable probability that Appellant would prevail on his $100 million fraud claim. See TEX. CIV. PRAC. & REM. CODE ANN. § 11.054. Appellee also attached documents showing that Appellant had filed at least five litigations in federal court that were finally determined adversely to Appellant, all within the seven-year period immediately preceding the date of Appellee's motion. See id.

Considering the evidence favorable to the trial court's finding and disregarding the contrary evidence, we hold that the evidence is legally sufficient to support the trial court's finding that Appellant is a vexatious litigant. See id.; see also City of Keller, 168 S.W.3d at 827. We overrule his second issue.

D. Findings of fact and conclusions of law

In his fourth issue, Appellant argues that the trial court erred by denying his request for findings of fact and conclusions of law regarding the trial court's dismissal order.

Findings of fact are not appropriate and should not be made when they serve no purpose. IKB Indus. v. Pro-Line Corp., 938 S.W.2d 440, 443 (Tex. 1997). A party is not entitled to findings of fact when a trial court renders judgment as a matter of law. Id. at 442.

Here, the trial court had a duty as a matter of statutory law to dismiss Appellant's lawsuit when Appellant failed to deposit the required security within the time ordered by the court. See TEX. CIV. PRAC. & REM. CODE ANN. § 11.056. To the extent that Appellant's request for findings of fact concerned the vexatious-litigant order, that order already recited the trial court's finding that Appellant was a vexatious litigant, and further findings of fact would have served no purpose. Therefore, we overrule Appellant's fourth issue.

Conclusion

Having overruled all of Appellant's issues, we affirm the trial court's order of dismissal.

PER CURIAM

PANEL B: GARDNER, DAUPHINOT, and HOLMAN, JJ.

DELIVERED: July 19, 2007

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COURT OF APPEALS

SECOND DISTRICT OF TEXAS

FORT WORTH

NO. 2-06-386-CV

ERIC GANT,
APPELLANT

V.

GRAND PRAIRIE FORD, L.P.,
APPELLEE.

FROM THE 96TH DISTRICT COURT OF TARRANT COUNTY

ORDER

We have considered appellant's "Motion For Rehearing."

It is the opinion of the court that the motion for rehearing should be and is hereby denied and that the opinion and judgment of July 19, 2007 stand unchanged.

The clerk of this court is directed to transmit a copy of the order to the attorneys of record.

DATED October 18, 2007.

PER CURIAM

PANEL B: GARDNER, DAUPHINOT, AND HOLMAN, JJ.

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STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

FOURTEENTH AMENDMENT. Section1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RESTATEMENT TORTS § 525 (1977) – DECEIT AND FRAUD. Section 525 of the Restatement (Second) of Torts defines fraud as making "a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation."

TEXAS RULES OF CIVIL PROCEDURE RULE 166A(I) – NO EVIDENCE MOTION. No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence.

The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

FEDERAL RULES OF EVIDENCE – RULE 401. Definition of "Relevant Evidence." "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

TEXAS RULES OF EVIDENCE – RULE 401. Definition of "Relevant Evidence." "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

TEXAS RULES OF EVIDENCE – RULE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible. All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

CIVIL PRACTICE & REMEDIES CODE CHAPTER 11. VEXATIOUS LITIGANTS SUBCHAPTER A. GENERAL PROVISIONS

SUBCHAPTER B. VEXATIOUS LITIGANTS

Sec.11.051. MOTION FOR ORDER DETERMINING PLAINTIFF A VEXATIOUS LITIGANT AND REQUESTING SECURITY. In a litigation in this state, the defendant may, on or before the 90th day after the date the defendant files the original answer or makes a special appearance, move the court for an order:(1) determining that the plaintiff is a vexatious litigant; and (2) requiring the plaintiff to furnish security. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec.11.052. STAY OF PROCEEDINGS ON FILING OF MOTION. (a) On the filing of a motion under Section 11.051, the litigation is stayed and the moving defendant is not required to plead: (1) if the motion is denied, before the 10th day after the date it is denied; or (2) if the motion is granted, before the 10th day after the date the moving defendant receives written notice that the plaintiff has furnished the required security. (b) On the filing of a motion under Section 11.051 on or after the date the trial starts, the litigation is stayed for a period the court determines. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec.11.053. HEARING. (a) On receipt of a motion under Section 11.051, the court shall, after notice to all parties, conduct a hearing to determine whether to grant the motion. (b) The court may consider any evidence material to the ground of the motion, including: (1) written or oral evidence; and (2) evidence presented by witnesses or by affidavit. Added

by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec.11.054. CRITERIA FOR FINDING PLAINTIFF A VEXATIOUS LITIGANT. A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that: (1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been:(A) finally determined adversely to the plaintiff; (B) permitted to remain pending at least two years without having been brought to trial or hearing; or (C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure; (2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, in propria persona, either: (A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or (B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant as to whom the litigation was finally determined; or (3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec.11.055. SECURITY. (a) A court shall order the plaintiff to furnish security for the benefit of the

moving defendant if the court, after hearing the evidence on the motion, determines that the plaintiff is a vexatious litigant. (b) The court in its discretion shall determine the date by which the security must be furnished. (c) The court shall provide that the security is an undertaking by the plaintiff to assure payment to the moving defendant of the moving defendant's reasonable expenses incurred in or in connection with a litigation commenced, caused to be commenced, maintained, or caused to be maintained by the plaintiff, including costs and attorney's fees. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec.11.056. DISMISSAL FOR FAILURE TO FURNISH SECURITY. The court shall dismiss a litigation as to a moving defendant if a plaintiff ordered to furnish security does not furnish the security within the time set by the order. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec.11.057. DISMISSAL ON THE MERITS. If the litigation is dismissed on its merits, the moving defendant has recourse to the security furnished by the plaintiff in an amount determined by the court. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

SUBCHAPTER C. PROHIBITING FILING OF NEW LITIGATION

Sec.11.101. PREFILING ORDER; CONTEMPT. (a) A court may, on its own motion or the motion of any party, enter an order prohibiting a person from filing, in propria persona, a new litigation in a court in this state if the court finds, after notice and hearing as provided by Subchapter B, that:

(1) the person is a vexatious litigant; and (2) the local administrative judge of the court in which the person intends to file the litigation has not granted permission to the person under Section 11.102 to file the litigation. (b) A person who disobeys an order under Subsection (a) is subject to contempt of court. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec.11.102. PERMISSION BY LOCAL ADMINISTRATIVE JUDGE. (a) A local administrative judge may grant permission to a person found to be a vexatious litigant under Section 11.101 to file a litigation only if it appears to the judge that the litigation: (1) has merit; and (2) has not been filed for the purposes of harassment or delay. (b) The local administrative judge may condition permission on the furnishing of security for the benefit of the defendant as provided in Subchapter B. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.103. DUTIES OF CLERK; MISTAKEN FILING. (a) A clerk of a court may not file a litigation presented by a vexatious litigant subject to a prefiling order under Section 11.101 unless the litigant obtains an order from the local administrative judge permitting the filing. (b) If the clerk mistakenly files a litigation without an order from the local administrative judge, any party may file with the clerk and serve on the plaintiff and the other parties to the suit a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order under Section 11.101. On the filing of the notice, the court shall immediately stay the litigation and shall dismiss the litigation unless the plaintiff, not later than the 10th day after the date the notice is filed, obtains an

order from the local administrative judge under Section 11.102 permitting the filing of the litigation. (c) If the local administrative judge issues an order permitting the filing of the litigation under Subsection (b), the litigation remains stayed and the defendant need not plead until the 10th day after the date the defendant is served with a copy of the order. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.104. NOTICE TO OFFICE OF COURT ADMINISTRATION; DISSEMINATION OF LIST. (a) A clerk of a court shall provide the Office of Court Administration of the Texas Judicial System a copy of any prefiling order issued under Section 11.101. (b) The Office of Court Administration of the Texas Judicial System shall maintain a list of vexatious litigants subject to prefiling orders under Section 11.101 and shall annually send the list to the clerks of the courts of this state. Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 07-1000
COA #: 02-06-00386-CV
STYLE: ERIC GANT
v. GRAND PRAIRIE FORD, L.P.

DATE: 12/6/2007

[redacted]-217818-06

$ 00.25

A petition for review was filed today in the above-styled case. You may file either a response, or a waiver of response. If you file a waiver, the Court will not grant the petition without first requesting a response. (TEX. R. APP. P. 53.3) There is no fee for a response or a waiver.

MAIL TO:

MR. ERIC GANT
705 TUSKEGEE STREET
GRAND PRAIRIE TX 75051

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 07-1000
COA #: 02-06-00386-CV
STYLE: ERIC GANT
v. GRAND PRAIRIE FORD, L.P.

DATE: 2/8/2008

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MAIL TO:
MR. ERIC GANT
705 TUSKEGEE STREET
GRAND PRAIRIE TX 75051

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711-2248

RE: Case No. 07-1000
COA #: 02-06 00386-CV
STYLE: ERIC GANT
v. GRAND PRAIRIE FORD, L.P.

DATE: 4/4/2008

217818-06

$ 00.29

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MAIL TO:

MR. ERIC GANT
705 TUSKEGEE STREET
GRAND PRAIRIE TX 75051